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13 UNITED STATES DISTRICT COURT

14 SOUTHERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,) Criminal Case No. 07-CR-3405-W
16 v.)
17 Plaintiff,) DATE: March 17, 2008
18) TIME: 2:00 p.m.
19 MARIO RAYMOND FERNANDEZ (1),)
20 ERNESTO FLORES-BLANCO (2),)
21 Defendants.) **UNITED STATES' RESPONSE AND
22 OPPOSITION TO DEFENDANT
23 FERNANDEZ' MOTIONS TO SUPPRESS
24 STATEMENTS AND DISMISS THE
25 INDICTMENT**
26)
27)
28)

12 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel,
13 Karen P. Hewitt, United States Attorney, and David D. Leshner, Assistant United States Attorney, and
14 hereby files its response and opposition to defendant Mario Raymond Fernandez' motions to suppress
15 statements and dismiss the indictment. Said response and opposition is based upon the files and records
16 of this case together with the attached memorandum of points and authorities.

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MEMORANDUM OF POINTS AND AUTHORITIES**I****STATEMENT OF THE CASE**

On December 20, 2007, defendants Mario Raymond Fernandez and Ernesto Flores-Blanco were arraigned on a one-count Indictment charging them with inducing and encouraging illegal aliens to enter the United States and aiding and abetting, in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(iv) and (v)(II). Defendants entered pleas of not guilty.

II**STATEMENT OF FACTS**

The Government incorporates the Statement of Facts contained in its previously-filed response and opposition to Fernandez' motion for discovery.

III**ARGUMENT****A. Motion To Suppress Statements**

Border Patrol agents arrested Fernandez at approximately 12:45 a.m. on December 10, 2007. He was advised of his Miranda rights shortly thereafter at approximately 3:50 a.m. Fernandez acknowledged that he understood his rights, and he agreed to answer questions without the presence of an attorney. The interview lasted for approximately 24 minutes and concluded at 4:14 a.m.

1. Fernandez' Miranda waiver was valid.

A statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966) and 18 U.S.C. § 3501 if a preponderance of the evidence indicates that the statement was made after an advisement of rights and was not elicited by improper coercion. See Colorado v. Connelly, 479 U.S. 157, 167-70 (1986) (preponderance of evidence standard governs voluntariness and Miranda determinations; valid waiver of Miranda rights should be found in the "absence of police overreaching"). In assessing the validity of a defendant's Miranda waiver, courts analyze the totality of the circumstances surrounding the interrogation. Moran v. Burbine, 475 U.S. 412, 421 (1986). Factors commonly considered include: (1) the defendant's age (see United States v. Doe, 155 F.3d 1070, 1074-75 (9th Cir. 1998) (*en banc*) (valid waiver because the 17-year-old defendant did

1 not have trouble understanding questions, gave coherent answers, and did not ask officers to notify
 2 parents)); (2) the defendant's familiarity with the criminal justice system (see United States v. Williams,
 3 291 F.3d 1180, 1190 (9th Cir. 2002) (waiver valid in part because defendant was familiar with the
 4 criminal justice system from past encounters)); (3) the explicitness of the Miranda waiver (see United
 5 States v. Bernard S., 795 F.2d 749, 753 n.4 (9th Cir. 1986) (a written Miranda waiver is "strong
 6 evidence that the waiver is valid")); United States v. Amano, 229 F.3d 801, 805 (9th Cir. 2000) (waiver
 7 valid where Miranda rights were read to defendant twice and defendant signed a written waiver)); and
 8 (4) the time lapse between the reading of the Miranda warnings and the interrogation or confession. See
 9 Guam v. Dela Pena, 72 F.3d 767, 769-70 (9th Cir. 1995) (valid waiver despite 15-hour delay between
 10 Miranda warnings and interview).

11 Here, the undisputed facts demonstrate that agents advised Fernandez of his Miranda rights and
 12 that Fernandez knowingly and voluntarily waived those rights prior to any post-arrest custodial
 13 interrogation. Fernandez was arrested after 12:45 a.m. on December 10, 2007. He was advised of his
 14 Miranda rights shortly thereafter at approximately 3:50 a.m. Fernandez acknowledged that he
 15 understood his rights, and he agreed to answer questions without the presence of an attorney. Simply
 16 put, agents complied with Miranda, and Fernandez fails to allege with any specificity that either the
 17 Miranda advisal or his ensuing waiver was improper.

18 **2. Fernandez' statements were voluntary.**

19 The totality of circumstances further demonstrates that Fernandez' post-arrest statements were
 20 voluntary. A defendant's statement is involuntary only if it is "coerced either by physical intimidation
 21 or psychological pressure." United States v. Crawford, 372 F.3d 1048, 1060 (9th Cir. 2004) (citation
 22 omitted). Thus, "the question is whether the defendant's will was overborne at the time he confessed." Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir. 2003) (citation omitted). Psychological coercion
 24 invokes no per se rule. United States v. Miller, 984 F.2d 1028, 1030 (9th Cir. 1993). Therefore, the
 25 Court must "consider the totality of the circumstances involved and their effect upon the will of the
 26 defendant." Id. at 1031 (citation omitted). In all cases, "coercive police activity is a necessary predicate
 27 to the finding that a confession is not 'voluntary' . . ." Connelly, 479 U.S. at 167.

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In determining the issue of voluntariness, 18 U.S.C. § 3501(b) sets forth five relevant factors: (1) the time elapsing between the defendant's arrest and arraignment, if the statement was made after arrest and before arraignment, (2) whether the defendant knew the nature of the offense with which he or she was charged or of which he was suspected at the time of making the statement, (3) whether or not the defendant was advised or knew that he or she was not required to make any statement and that any such statement could be used against him, (4) whether or not the defendant had been advised prior to questioning of his or her right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. All five § 3501(b) factors need not be met to find the statement was voluntarily made. See United States v. Andaverde, 64 F.3d 1305, 1313 (9th Cir. 1995)

As discussed above, Fernandez was read his Miranda rights pre-interview. After Fernandez acknowledged his Miranda rights, he elected to make a statement without having an attorney present. Fernandez clearly understood his Miranda rights and agreed to waive those rights. See United States v. Gamez, 301 F.3d 1138, 1144 (9th Cir. 2002) (holding defendant's confession voluntary). Moreover, Fernandez' statements were not the product of physical intimidation or psychological pressure of any kind by any government agent, and there is no evidence before the Court that his will was overborne at the time of his statements. Consequently, the Court should deny the motion to suppress his statements as involuntary.

3. **Fernandez is not entitled to an evidentiary hearing.**

"An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist." United States v. Howell, 231 F.3d 616, 620 (9th Cir. 2000) (citation omitted). Local Criminal Rule 47.1(g)(1) provides, in relevant part:

Criminal motions requiring predicate factual finding shall be supported by declaration(s) The Court need not grant an evidentiary hearing where either party fails to properly support its motion or opposition.

A District Court may properly deny a request for an evidentiary hearing on a motion to suppress evidence where the defendant does not submit a declaration pursuant to a local rule. United States v.

1 Wardlow, 951 F.2d 1115, 1116 (9th Cir. 1991). See also United States v. Batiste, 868 F.2d 1089, 1093
 2 (9th Cir. 1989) (“[T]he defendant, in his motion to suppress, failed to dispute any material fact in the
 3 government’s proffer. In these circumstances, the district court was not required to hold an evidentiary
 4 hearing.”); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (boilerplate
 5 motion containing indefinite and unsworn allegations held insufficient to require evidentiary hearing
 6 on defendant’s motion to suppress statements).

7 No rights are infringed by the requirement of such a declaration because the declaration cannot
 8 be used by the United States at trial over a defendant’s objection. Batiste, 868 F.2d at 1092 (proper to
 9 require declaration in support of Fourth Amendment motion to suppress); Moran-Garcia, 783 F. Supp.
 10 at 1271-74 (extending Batiste to Fifth Amendment motion to suppress). Moreover, Fernandez possesses
 11 at least as much information as the United States in regards to the statements he made. Batiste, 868 F.2d
 12 at 1092. In the context of a motion to suppress statements, which requires police misconduct suffered
 13 by Fernandez while in custody, Fernandez certainly should be able to provide the facts supporting any
 14 claim of misconduct.

15 Here, Fernandez’ election not to submit a declaration is a plain violation of Local Rule 47.1(g).
 16 Further, the absence of a declaration prevents this Court from making a finding that disputed issues of
 17 fact exist in the first instance. Howell, 231 F.3d at 620. As such, the Court should deny Defendant’s
 18 motion without an evidentiary hearing. Batiste, 868 F.2d at 1092 (Government proffer alone is adequate
 19 to defeat a motion to suppress where the defense fails to adduce specific and material disputed facts).

20 **B. MOTION TO DISMISS THE INDICTMENT**

21 **1. Introduction**

22 Defendant makes contentions relating to two separate instructions given to the grand jury during
 23 its impanelment by United States District Judge Larry A. Burns on January 11, 2007. Defendant’s
 24 Memorandum of Points and Authorities filed March 3, 2008 at 7-23 (hereafter “Memorandum”).¹

26 ¹ Defendant supplies a partial transcript of the grand jury proceedings which records the
 27 instructions to the impaneled grand jurors after the voir dire had been conducted. See Exhibit A
 28 to Memorandum (hereafter “Exhibit A”). Defendant also supplies a partial transcript of the grand
 29 jury proceedings which records the voir dire of several potential witnesses. See Exhibit B to
 30 Memorandum (hereafter “Exhibit B”). To amplify the record herein, the United States is

1 Although recognizing that the Ninth Circuit in United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir.
 2 2005) (en banc) generally found the two grand jury instructions constitutional, Defendant here contends
 3 Judge Burns went beyond the text of the approved instructions, and by so doing rendered them improper
 4 to the point that the Indictment should be dismissed.

5 In making his arguments concerning the two separate instructions, Defendant urges this Court
 6 to dismiss the Indictment on two separate bases relating to grand jury procedures, both of which were
 7 discussed in United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992). Concerning the first attacked
 8 instruction, Defendant urges this Court to dismiss the Indictment by exercising its supervisory powers
 9 over grand jury procedures. Memorandum at 21-23. This is a practice the Supreme Court discourages
 10 as Defendant acknowledges, citing United States v. Williams, 504 U.S. 36, 50 (1992) (“Given the grand
 11 jury’s operational separateness from its constituting court, it should come as no surprise that we have
 12 been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury
 13 procedure.”). Id. Isgro reiterated:

14 [A] district court may draw on its supervisory powers to dismiss an indictment. The
 15 supervisory powers doctrine “is premised on the inherent ability of the federal courts to
 16 formulate procedural rules not specifically required by the Constitution or Congress to
 17 supervise the administration of justice.” Before it may invoke this power, a court must
first find that the defendant is actually prejudiced by the misconduct. Absent such
 prejudice – that is, absent “grave’ doubt that the decision to indict was free from the
 substantial influence of [the misconduct]” – a dismissal is not warranted.

18 974 F.2d at 1094 (citation omitted, emphasis added). Concerning the second attacked instruction, in an
 19 attempt to dodge the holding in Williams, Defendant appears to base his contentions on the Constitution
 20 as a reason to dismiss the Indictment. See Memorandum at 23 (“A grand jury so badly misguided is no
 21 grand jury at all under the Fifth Amendment.”). Concerning that kind of a contention, Isgro stated:

22 [A] court may dismiss an indictment if it perceives constitutional error that interferes
 23 with the grand jury’s independence and the integrity of the grand jury proceeding.
 24 “Constitutional error is found where the ‘structural protections of the grand jury have
 25 been so compromised as to render the proceedings fundamentally unfair, allowing the
 presumption of prejudice’ to the defendant.” Constitutional error may also be found “if
 [the] defendant can show a history of prosecutorial misconduct that is so systematic and
 pervasive that it affects the fundamental fairness of the proceeding or if the
 independence of the grand jury is substantially infringed.”

27 supplying a redacted supplemental transcript which records relevant portions of the voir dire
 28 proceedings. See Appendix to United States’ Response and Opposition to Defendant’s Motions
 (hereafter “United States’ Appendix”).

1 974 F.2d at 1094 (citation omitted).²

2 The portions of the two relevant instructions approved in Navarro-Vargas were:

3 You cannot judge the wisdom of the criminal laws enacted by Congress, that is,
4 whether or not there should or should not be a federal law designating certain activity
as criminal. That is to be determined by Congress and not by you.

5 408 F.3d at 1187, 1202.

6 The United States Attorney and his Assistant United States Attorneys will provide you
7 with important service in helping you to find your way when confronted with complex
8 legal problems. It is entirely proper that you should receive this assistance. If past
experience is any indication of what to expect in the future, then you can expect candor,
honesty, and good faith in matters presented by the government attorneys.

9 408 F.3d at 1187, 1206.

10 Concerning the “wisdom of the criminal laws” instruction, the court stated it was constitutional
11 because, among other things, “[i]f a grand jury can sit in judgment of wisdom of the policy behind a law,
12 then the power to return a no bill in such cases is the clearest form of ‘jury nullification.’”³ 408 F.3d
13 at 1203 (footnote omitted). “Furthermore, the grand jury has few tools for informing itself of the policy
14 or legal justification for the law; it receives no briefs or arguments from the parties. The grand jury
15 has little but its own visceral reaction on which to judge the ‘wisdom of the law.’” Id.

16 Concerning the “United States Attorney and his Assistant United States Attorneys” instruction,
17 the court stated:

18 We also reject this final contention and hold that although this passage may include
19 unnecessary language, it does not violate the Constitution. The “candor, honesty, and
20 good faith” language, when read in the context of the instructions as a whole, does not
21 violate the constitutional relationship between the prosecutor and grand jury. . . . The
22 instructions balance the praise for the government’s attorney by informing the grand
jurors that some have criticized the grand jury as a “mere rubber stamp” to the
prosecution and reminding them that the grand jury is “independent of the United States
Attorney[.]”

23 ² In Isgro, the defendants choose the abrogation of constitutional rights route when
24 asserting that prosecutors have a duty to present exculpatory evidence to grand juries. They did
25 not prevail. 974 F.2d at 1096 (“we find that there was no abrogation of constitutional rights
sufficient to support the dismissal of the indictment.” (relying on Williams)).

26 ³ The Court acknowledged that as a matter of fact jury nullification does take place, and
27 there is no way to control it. “We recognize and do not discount that some grand jurors might in
fact vote to return a no bill because they regard the law as unwise at best or even unconstitutional.
28 For all the reasons we have discussed, there is no post hoc remedy for that; the grand jury’s
motives are not open to examination.” 408 F.3d at 1204 (emphasis in original).

1 408 F.3d at 1207. Id. “The phrase is not vouching for the prosecutor, but is closer to advising the grand
 2 jury of the presumption of regularity and good faith that the branches of government ordinarily afford
 3 each other.” Id.

4 **2. The Expanded “Wisdom of the Criminal Laws” Instruction Was Proper**

5 Concerning whether the new grand jurors should concern themselves with the wisdom of the
 6 criminal laws enacted by Congress, Judge Burns’ full instruction stated:

7 You understood from the questions and answers that a couple of people were excused,
 8 I think three in this case, because they could not adhere to the principle that I’m about
 to tell you.

9 But it’s not for you to judge the wisdom of the criminal laws enacted by congress; that
 10 is, whether or not there should be a federal law or should not be a federal law
 designating certain activity is criminal is not up to you. That’s a judgment that congress
 makes.

11 And if you disagree with the judgment made by congress, then your option is not to say
 12 “Well I’m going to vote against indicting even though I think that the evidence is
 13 sufficient” or “I’m going to vote in favor of even though the evidence may be
 insufficient.” Instead, your obligation is to contact your congressman or advocate for
 14 a change in the laws, but not to bring your personal definition of what the law ought to
 be and try to impose that through applying it in a grand jury setting.

15 Exhibit A at 8-9.⁴

16 In line with Navarro-Vargas, Judge Burns instructed the grand jurors that they were forbidden
 17 “from judg[ing] the wisdom of the criminal laws enacted by Congress; that is, whether or not there
 18 should be a federal law or should not be a federal law designating certain activity [as] criminal is not
 19 up to you.” Exhibit A at 8. Defendant claims, however, that the instructions “make it painfully clear
 20 that grand jurors simply may not choose not to indict in the event of what appears to them to be an
 21 unfair application of the law: should ‘you disagree with that judgment made by Congress, then your
 22 option is not to say ‘well, I’m going to vote against indicting even though I think that the evidence is
 23 sufficient....’” Memorandum at 15. Defendant contends that this addition to the approved instruction

25
 26 ⁴ The United States’ Appendix recounts the excusing of the three individuals. This
 transcript involves the voir dire portion of the grand jury selection process, and has been redacted
 27 to include redaction of the individual names, so as to provide only the relevant three incidents
 wherein prospective grand jurors were excused. Specifically, the pages of the supplemental
 28 transcript supplied are: United States’ Appendix at 15, line 10; 17, line 18; 24, line 14; 28, line 2;
 38, line 9; and 44, line 17.

1 “flatly bars the grand jury from declining to indict because the grand jurors disagree with a proposed
 2 prosecution.” Id. Defendant further contends that the flat prohibition was preemptively reinforced by
 3 Judge Burns when excused prospective grand jurors.

4 In concocting his theory of why Judge Burns erred, Defendant posits that the expanded
 5 instruction renders irrelevant the debate about what the word “should” means. Memorandum at 15.
 6 Defendant contends that “the instruction flatly bars the grand jury from declining to indict because they
 7 disagree with a proposed prosecution.” Id. This argument mixes-up two of the holdings in Navarro-
Vargas in the hope they will blend into one. They do not.

9 Navarro-Vargas does permit flatly barring the grand jury from disagreeing with the wisdom of
 10 the criminal laws. The statement, “[y]ou cannot judge the wisdom of the criminal laws enacted by
 11 Congress,” (emphasis added) authorized by Navarro-Vargas, 408 F.3d at 1187, 1202, is not an
 12 expression of discretion. Jury nullification is forbidden although acknowledged as a sub rosa fact in
 13 grand jury proceedings. 408 F.3d at 1204. In this respect Judge Burns was absolutely within his rights,
 14 and within the law, when he excused the three prospective grand jurors because of their expressed
 15 inability to apply the laws passed by Congress. Similarly, it was proper for him to remind the impaneled
 16 grand jurors that they could not question the wisdom of the laws. As we will establish, this reminder
 17 did not pressure the grand jurors to give up their discretion not to return an indictment. Judge Burns’
 18 words cannot be parsed to say that they flatly barred the grand jury from declining to indict because the
 19 grand jurors disagree with a proposed prosecution, because they do not say that. That aspect of a grand
 20 jury’s discretionary power (i.e., disagreement with the prosecution) was dealt with in Navarro-Vargas
 21 in its discussion of another instruction wherein the term “should” was germane.⁵ 408 F.3d at 1204-06.

22
 23 ⁵ That instruction is not at issue here. It read as follows:
 24
 25 [Y]our task is to determine whether the government’s evidence as presented to you
 26 is sufficient to cause you to conclude that there is probable cause to believe that the
 27 accused is guilty of the offense charged. To put it another way, you should vote
 28 to indict where the evidence presented to you is sufficiently strong to warrant a
 reasonable person’s believing that the accused is probably guilty of the offense
 with which the accused is charged.

1 This other instruction bestows discretion on the grand jury not to indict.⁶ In finding this instruction
 2 constitutional, the court stated in words that ring true here: “It is the grand jury’s position in the
 3 constitutional scheme that gives it its independence, not any instructions that a court might offer.” 408
 4 F.3d at 1206. The other instruction was also given by Judge Burns in his own fashion as follows:

5 The function of the grand jury, in federal court at least, is to determine probable cause.
 6 That’s the simple formulation that I mentioned to a number of you during the jury
 7 selection process. Probable cause is just an analysis of whether a crime was committed
 8 and there’s a reasonable basis to believe that and whether a certain person is associated
 9 with the commission of that crime, committed it or helped commit it.

10 If the answer is yes, then as grand jurors your function is to find that the probable cause
 11 is there, that the case has been substantiated, and it should move forward. If
 12 conscientiously, after listening to the evidence, you say “No, I can’t form a reasonable
 13 belief has anything to do with it, then your obligation, of course, would be to decline to
 14 indict, to turn the case away and not have it go forward.

15 Exhibit A at 3-4.

16 Probable cause means that you have an honestly held conscientious belief and that
 17 the belief is reasonable that a federal crime was committed and that the person to
 18 be indicted was somehow associated with the commission of that crime. Either
 19 they committed it themselves or they helped someone commit it or they were part
 20 of a conspiracy, an illegal agreement, to commit that crime.

21 To put it another way, you should vote to indict when the evidence presented to you is
 22 sufficiently strong to warrant a reasonable person to believe that the accused is probably
 23 guilty of the offense which is proposed.

24 Exhibit A at 23.

25 While the new grand jurors were told by Judge Burns that they could not question the wisdom
 26 of the criminal laws per Navarro-Vargas, they were also told by Judge Burns they had the discretion not
 27 to return an indictment per Navarro-Vargas. Further, if a potential grand juror could not be dissuaded
 28

29 ⁶ The court upheld the instruction stating:

30 This instruction does not violate the grand jury’s independence. The
 31 language of the model charge does not state that the jury “must” or “shall” indict,
 32 but merely that it “should” indict if it finds probable cause. As a matter of pure
 33 semantics, it does not “eliminate discretion on the part of the grand jurors,” leaving
 34 room for the grand jury to dismiss even if it finds probable cause.

35 408 F.3d at 1205 (confirming holding in United States v. Marcucci, 299 F.3d 1156, 1159 (9th Cir.
 36 2002) (per curiam)). “In this respect, the grand jury has even greater powers of nonprosecution
 37 than the executive because there is, literally, no check on a grand jury’s decision not to return an
 38 indictment.” 408 F.3d at 1206.

1 from questioning the wisdom of the criminal laws, that grand juror should be dismissed as a potential
 2 jury nullification advocate. See Merced v. McGrath, 426 F.3d 1076, 1079-80 (9th Cir. 2005). Thus,
 3 there was no error requiring dismissal of this Indictment or any other indictment by this Court exercising
 4 its supervisory powers.

5 Further, a reading of the dialogues between Judge Burns and the three excused jurors found in
 6 the supplemental transcript excerpts (see United States' Appendix) reflects a measured, thoughtful,
 7 almost mutual decision, that those three individuals should not serve on the grand jury because of their
 8 views. Judge Burns' reference back to those three colloquies cannot be construed as pressuring the
 9 impaneled grand jurors, but merely bespeaks a reminder to the grand jury of their duties.

10 Finally, even if there was an error, Defendant has not demonstrated he was actually prejudiced
 11 thereby, a burden he has to bear. "Absent such prejudice – that is, absent 'grave' doubt that the decision
 12 to indict was free from the substantial influence of [the misconduct]" – a dismissal is not warranted."
 13 Isgro, 974 F.2d at 1094.

14 **3. The Addition to the "United States Attorney and his Assistant United States**
 15 **Attorneys" Instruction Did Not Violate the Constitution.**

16 Concerning the new grand jurors' relationship to the United States Attorney and the Assistant
 17 U.S. Attorneys, Judge Burns variously stated:

18 [T]here's a close association between the grand jury and the U.S. Attorney's Office.

19 You'll work closely with the U.S. Attorney's Office in your investigation of cases.

20 Exhibit A at 11.

21 [I]n my experience here in the over 20 years in this court, that kind of tension does not
 22 exist on a regular basis, that I can recall, between the U.S. Attorney and the grand juries.
 They generally work together.

23 Exhibit A at 12.

24 Now, again, this emphasizes the difference between the function of the grand jury and
 25 the trial jury. You're all about probable cause. If you think that there's evidence out
 26 there that might cause you to say "well, I don't think probable cause exists," then it's
 27 incumbent upon you to hear that evidence as well. As I told you, in most instances, the
 28 U.S. Attorneys are duty-bound to present evidence that cuts against what they may be
 asking you to do if they're aware of that evidence.

1 Exhibit A at 20.⁷

2 As a practical matter, you will work closely with government lawyers. The U.S.
 3 Attorney and the Assistant U.S. Attorneys will provide you with important services and
 4 help you find your way when you're confronted with complex legal matters. It's entirely
 5 proper that you should receive the assistance from the government lawyers.

6 But at the end of the day, the decision about whether a case goes forward and an
 7 indictment should be returned is yours and yours alone. If past experience is any
 8 indication of what to expect in the future, then you can expect that the U.S. Attorneys
 9 that will appear in front of you will be candid, they'll be honest, that they'll act in
 10 good faith in all matters presented to you.

11 Exhibit A at 26-27.

12 Commenting on the phrase, "the U.S. Attorneys are duty-bound to present evidence that cuts
 13 against what they may be asking you to do if they're aware of that evidence," Defendant proposes that
 14 by making that statement, "Judge Burns also assured the grand jurors that prosecutors would present
 15 to them evidence that tended to undercut probable cause." Memorandum at 12. Defendant then ties this
 16 statement to the later instruction which "advis[ed] the grand jurors that they 'can expect that the U.S.
 17 Attorneys that will appear in front of [them] will be candid, they'll be honest, and . . . they'll act in good
 18 faith in all matters presented to you.'" *Id.* From this lash-up Defendant contends:

19 These instructions create a presumption that, in cases where the prosecutor does not
 20 present exculpatory evidence, no exculpatory evidence exists. A grand juror's reasoning,
 21 in a case in which no exculpatory evidence was presented, would proceed along these
 22 lines:

- 23 (1) I have to consider evidence that undercuts probable cause.
- 24 (2) The candid, honest, duty-bound prosecutor would, in good faith, have presented
 25 any such evidence to me, if it existed.
- 26 (3) Because no such evidence was presented to me, I may conclude that there is
 27 none.

28 Even if some exculpatory evidence were presented, a grand juror would necessarily
 29 presume that the evidence presented represents the universe of all available

25 ⁷ Just prior to this instruction, Judge Burns had informed the grand jurors that:

26 [T]hese proceedings tend to be one-sided necessarily. . . . Because it's not a
 27 full-blown trial, you're likely in most cases not to hear the other side of the
 28 story, if there is another side to the story.

Exhibit A at 19.

1 exculpatory evidence; if there was more, the duty-bound prosecutor would have
 2 presented it.

3 The instructions therefore discourage investigation – if exculpatory evidence were out
 4 there, the prosecutor would present it, so investigation is a waste of time and provide
 5 additional support to every probable cause determination: i.e., this case may be weak,
 6 but I know that there is nothing on the other side of the equation because it was not
 7 presented. A grand jury so badly misguided is no grand jury at all under the Fifth
 8 Amendment.

9 Memorandum at 23.⁸

10 Frankly, Judge Burns' statement that "the U.S. Attorneys are duty-bound to present evidence
 11 that cuts against what they may be asking you to do if they're aware of that evidence," is directly
 12 contradicted by United States v. Williams, 504 U.S. 36, 51-53 (1992) ("If the grand jury has no
 13 obligation to consider all 'substantial exculpatory' evidence, we do not understand how the prosecutor
 14 can be said to have a binding obligation to present it."⁹ (emphasis added)). See also United States v.
15 Haynes, 216 F.3d 789, 798 (9th Cir. 2000) ("Finally, their challenge to the government's failure to
 16 introduce evidence impugning Fairbanks's credibility lacks merit because prosecutors have no
 17 obligation to present all evidence, let alone evidence that cuts against them.").

18 ⁸ The term "presumption" is too strong a word in this setting. The term "inference" is
 19 more appropriate. See McClean v. Moran, 963 F.2d 1306 (9th Cir. 1992) which states there are
 20 (1) permissive inferences; (2) mandatory rebuttable presumptions; and (3) mandatory conclusive
 21 presumptions, and explains the difference between the three. 963 F.2d at 1308-09 (discussing
 22 Francis v. Franklin, 471 U.S. 314 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); and Ulster
23 County Court v. Allen, 442 U.S. 140, 157 & n. 16 (1979)). See also United States v. Warren, 25
 24 F.3d 890, 897 (9th Cir. 1994).

25 ⁹ Note that in Williams the Court established:

26 Respondent does not contend that the Fifth Amendment itself obliges the
 27 prosecutor to disclose substantial exculpatory evidence in his possession to the
 28 grand jury. Instead, building on our statement that the federal courts "may, within
 29 limits, formulate procedural rules not specifically required by the Constitution or
 30 the Congress," he argues that imposition of the Tenth Circuit's disclosure rule is
 31 supported by the courts' "supervisory power."

32 504 U.S. at 45 (citation omitted). The Court concluded, "we conclude that courts have no
 33 authority to prescribe such a duty [to present exculpatory evidence] pursuant to their inherent
 34 supervisory authority over their own proceedings." 504 U.S. at 55. See also United States v.
35 Haynes, 216 F.3d 789, 797-98 (9th Cir. 2000). However, the Ninth Circuit in Isgro used
36 Williams' holding that the supervisory powers would not be invoked to ward off an attack on
 37 grand jury procedures couched in constitutional terms. 974 F.2d at 1096.

1 obligation to disclose ‘substantial exculpatory evidence’ to a grand jury.” (citing Williams) (emphasis
2 added)).

3 However, the analysis does not stop there. Prior to assuming his judicial duties, Judge Burns
4 was a member of the United States Attorney’s Office, and made appearances in front of the federal
5 grand jury.¹⁰ As such he was undoubtedly aware of the provisions in the United States Attorneys’
6 Manual (“USAM”).¹¹ Specifically, it appears he is aware of USAM Section 9-11.233, which states:

In United States v. Williams, 112 S.Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

13 (Emphasis added.)¹² This policy was reconfirmed in USAM 9-5.001, Policy Regarding Disclosure of
14 Exculpatory and Impeachment Information, Paragraph “A,” “this policy does not alter or supersede the
15 policy that requires prosecutors to disclose ‘substantial evidence that directly negates the guilt of a
16 subject of the investigation’ to the grand jury before seeking an indictment, see USAM § 9-11.233.”
17 (Emphasis added.)¹³

¹⁰ He recalled those days when instructing the new grand jurors. Exhibit A at 12, 14-16, 17-18.

¹¹ The USAM is available on the World Wide Web at www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html.

¹² See www.usdoj.gov/usa/oousa/foia_reading_room/usam/title9/11mcrm.htm. Even if Judge Burns did not know of this provision in the USAM while he was a member of the United States Attorney's Office, because of the accessibility of the USAM on the Internet, as the District Judge overseeing the grand jury he certainly could determine the required duties of the United States Attorneys appearing before the grand jury from that source.

²⁶ ¹³ See www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm. Similarly,
²⁷ this new section does not bestow any procedural or substantive rights on defendants.

Under this policy, the government's disclosure will exceed its constitutional obligations. This expanded disclosure policy, however, does not create a general

1 The fact that Judge Burns' statement contradicts Williams, but is in line with self-imposed
 2 guidelines for United States Attorneys, does not create the constitutional crisis proposed by Defendant.
 3 No improper presumption/inference was created when Judge Burns reiterated what he knew to be a self-
 4 imposed duty to the new grand jurors. Simply stated, in the vast majority of the cases the reason the
 5 prosecutor does not present "substantial" exculpatory evidence, is because no "substantial" exculpatory
 6 evidence exists.¹⁴ If it does exist, as mandated by the USAM, the evidence should be presented to the
 7 grand jury by the Assistant U.S. Attorney upon pain of possibly having his or her career destroyed by
 8 an Office of Professional Responsibility investigation. Even if there is some nefarious slant to the grand
 9 jury proceedings when the prosecutor does not present any "substantial" exculpatory evidence, because
 10 there is none, the negative inference created thereby in the minds of the grand jurors is legitimate. In
 11 cases such as Defendant's, the Government has no "substantial" exculpatory evidence generated from
 12 its investigation or from submissions tendered by the defendant.¹⁵ There is nothing wrong in this
 13 scenario with a grand juror inferring from this state-of-affairs that there is no "substantial" exculpatory
 14 evidence, or even if some exculpatory evidence were presented, the evidence presented represents the
 15 universe of all available exculpatory evidence.

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right of discovery in criminal cases. Nor does it provide defendants with any
 18 additional rights or remedies.

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USAM 9-5.001, ¶'E". See www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

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¹⁴ Recall Judge Burns also told the grand jurors that:

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[T]hese proceedings tend to be one-sided necessarily. . . . Because
 it's not a full-blown trial, you're likely in most cases not to hear the
 other side of the story, if there is another side to the story.

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Exhibit A at 19.

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¹⁵ Realistically, given "that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge [i.e. only finding probable cause]," Williams, 504 U.S. at 51 (citing United States v. Calandra, 414 U.S. 338, 343-44 (1974)), no competent defense attorney is going to preview the defendant's defense story prior to trial assuming one will be presented to a fact-finder. Therefore, defense submissions to the grand jury will be few and far between.

Further, just as the instruction language regarding the United States Attorney attacked in Navarro-Vargas was found to be “unnecessary language [which] does not violate the Constitution,” 408 F.3d at 1207, so too the “duty-bound” statement was unnecessary when charging the grand jury concerning its relationship with the United States Attorney and her Assistant U.S. Attorneys, and does not violate the Constitution. In United States v. Isgro, 974 F.2d 1091 (9th Cir. 1992), the Ninth Circuit while reviewing Williams established that there is nothing in the Constitution which requires a prosecutor to give the person under investigation the right to present anything to the grand jury (including his or her testimony or other exculpatory evidence), and the absence of that information does not require dismissal of the indictment. 974 F.2d at 1096 (“Williams clearly rejects the idea that there exists a right to such ‘fair’ or ‘objective’ grand jury deliberations.”). That the USAM imposes a duty on United States Attorneys to present “substantial” exculpatory evidence to the grand jury is irrelevant since by its own terms the USAM excludes defendants from reaping any benefits from the self-imposed policy.¹⁶ Therefore, while the “duty-bound” statement was an interesting tidbit of information, it was unnecessary in terms of advising the grand jurors of their rights and responsibilities, and does not cast an unconstitutional pall upon the instructions which requires dismissal of the indictment in this case or any case. The grand jurors were repeatedly instructed by Judge Burns that, in essence, the United States Attorneys are “good guys,” which was authorized by Navarro-Vargas. 408 F.3d at 1206-07 (“laudatory comments . . . not vouching for the prosecutor”). But he also repeatedly “remind[ed] the grand jury that it stands between the government and the accused and is independent,” which was also required by Navarro-Vargas. 408 F.3d at 1207. In this context the unnecessary “duty-bound” statement does not mean the instructions were constitutionally defective requiring dismissal of this indictment or any indictment.

23 The “duty bound” statement constitutional contentions raised by Defendant do not indicate that
24 the “structural protections of the grand jury have been so compromised as to render the proceedings
25 fundamentally unfair, allowing the presumption of prejudice’ to the defendant,” and “[the] defendant

¹⁶ The apparent irony is that although an Assistant U.S. Attorney will not lose a case for failure to present exculpatory information to a grand jury per Williams, he or she could lose his or her job with the United States Attorney's Office for such a failure per the USAM.

1 can[not] show a history of prosecutorial misconduct that is so systematic and pervasive that it affects
2 the fundamental fairness of the proceeding or if the independence of the grand jury is substantially
3 infringed.” Isgro, 974 F.2d at 1094 (citation omitted). Therefore, this Indictment, or any other
4 indictment, need not be dismissed.

5 **IV**

6 **CONCLUSION**

7 For the foregoing reasons, the Government respectfully requests that the Court deny defendant’s
8 motions.

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10 DATED: March 7, 2008.

Respectfully submitted,

11 Karen P. Hewitt
12 United States Attorney

13 s/ David D. Leshner
14 DAVID D. LESHNER
15 Assistant U.S. Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 07-CR-3405-W

Plaintiff,)

V.)

MARIO RAYMOND FERNANDEZ (1), } CERTIFICATE OF SERVICE

ERNESTO FLORES-BLANCO (2)

Defendants

CERTIFICATE OF SERVICE

10

IT IS HEREBY CERTIFIED THAT:

12

I, DAVID D. LESHNER, am a citizen of the United States and am at least eighteen years of age.

13

My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

14

I am not a party to the above-entitled action. I have caused service of **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT FERNANDEZ' MOTIONS TO SUPPRESS AND TO DISMISS THE INDICTMENT** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

18

Candis Mitchell, Esq.

19

Sylvia Baiz, Esq.

20

I declare under penalty of perjury that the foregoing is true and correct.

22

Executed on March 7, 2008.

23

/s/ David D. Leshner
DAVID D. LESHNER